Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
GTE CORPORATION,	)	
	)	
Transferor,	)	
	)	
and	)	CC Docket No. 98-184
	)	
BELL ATLANTIC CORPORATION,	)	
	)	
Transferee,	)	
	)	
For Consent to Transfer of Control	)	

SUPPLEMENTAL FILING OF BELL ATLANTIC AND GTE

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January 27, 2000

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Bell Atlantic and GTE hereby submit this comprehensive proposal for resolving all issues raised in connection with their proposed merger, and request that the Commission expeditiously grant their pending license transfer applications.

I. INTRODUCTION AND SUMMARY

As the applicants demonstrated in their prior filings, the merger of Bell Atlantic and GTE is strongly in the public interest. That is true today more than ever, and is reflected by the fact that the Department of Justice already has approved the merger, as have all but two of the state regulatory commissions whose approvals are required (and the remaining two are expected shortly). The merger of Bell Atlantic and GTE also is vastly different from other recent mergers. It is not a horizontal merger between actual competitors like MCI/WorldCom. And it is not a lateral merger of adjacent regional Bell companies, as was true of SBC/Ameritech or even Bell

Atlantic/NYNEX. Rather, it is a unique combination of complementary assets nationwide that includes a critically important vertical component. By creating a truly national competitor with the reach and mix of services necessary to take on AT&T/TCI/MediaOne, MCI WorldCom, and Sprint, the merger of Bell Atlantic and GTE will generate enormous public interest benefits for consumers of Internet, long distance, wireless, local and national bundled services -- benefits that either were not present at all, or were present only to a significantly lesser degree, in those prior mergers. And here, there is no material risk of competitive harm. In particular, unlike those prior mergers, where the Commission concluded that adjacent RBOCs with major metropolitan markets in common are among the most likely potential significant competitors to one another, the service areas of Bell Atlantic and GTE do not overlap, and neither is a likely (or even less than likely) potential significant competitor of the other.

Because the merger of Bell Atlantic and GTE will produce enormous benefits with no risk of countervailing harms, it readily satisfies the Commission's public interest standard with no conditions. Nonetheless, to facilitate prompt approval, the companies are proposing here a comprehensive package of commitments that will produce still greater benefits. These commitments are patterned closely after those that the Commission adopted in its review of the SBC/Ameritech merger, subject to modification in a handful of instances to reflect the material differences between that merger and the present one. Taken as a whole, these commitments will further promote the widespread deployment of advanced services, spur local competition, and help to ensure that consumers continue to receive high quality and low cost telecommunications services.

In addition, to guarantee that the merged company remains faithful to both the letter and spirit of section 271, the applicants propose to transfer the Internet backbone and related assets of GTE Internetworking to a corporation that is owned and controlled by third-party public shareholders and will operate independently of Bell Atlantic/GTE. The merged company will receive only the ten percent equity interest expressly permitted by the 1996 Act, and an option to increase its ownership interest to a controlling level once it receives sufficient interLATA relief to operate the business. This solution not only complies with the law, but it will also increase further the company's already substantial incentive to demonstrate compliance with the competitive checklist and to complete the 271 authorization process as quickly as possible.

In sum, the comprehensive proposal outlined here removes any doubt that the merger of Bell Atlantic and GTE is in the public interest; it should be approved.

II. THE MERGER IS STRONGLY PRO-COMPETITIVE

The merger of Bell Atlantic and GTE will produce substantial pro-competitive and pro-consumer benefits in telecommunications markets across the country, with no countervailing risk of harm to competition in any market. Consequently, the merger is in the public interest, with or without conditions.

A. The Merger Will Produce Enormous Public Interest Benefits

The merger of Bell Atlantic and GTE is different in fundamental respects from other recent mergers that have been addressed by the Commission. It is not a merger of adjacent BOCs. On the contrary, it is a merger of broadly complementary assets dispersed nationwide. And rather than a purely lateral merger, it includes important and strongly pro-competitive vertical components, including the ultimate combination of GTE's competitively vital Internet backbone business and national long distance network with Bell Atlantic's established customer relationships in the concentrated and business-rich metropolitan markets in the Northeast.[1] As a result of these fundamental differences, the merger of Bell Atlantic and GTE will produce enormous public interest benefits of a type that simply were not present in previous mergers.

1. Internet and data services. The merger of Bell Atlantic and GTE will promote competition in the critically important Internet backbone business and, by doing so, enhance the competitiveness of the Internet and advanced data services generally. *See* Public Interest Statement (attached as Exhibit A to Bell Atlantic and GTE's Oct. 2, 1998 Application for Transfer of Control) at 3, 15-18 (hereafter "Pub. Int. Stmt."); Joint Reply Comments of Bell Atlantic and GTE at 9-11 (Dec. 23, 1998) (hereafter "Jt. Rep."). This is a benefit that was wholly lacking in other recent mergers, and is more important today than it was even at the time this merger was announced.

As this Commission itself recognized in its review of the MCI/WorldCom merger, the Internet backbone market is highly concentrated, and is dominated by a handful of major providers. *See WorldCom-MCI Order,* CC Docket No. 97-211, 13 FCC Rcd 18025, ¶ 148 (1998). In the time since, the problem has grown worse as concentration has continued to increase and the Big Three long distance incumbents have come to dominate the Internet backbone business to an increasing degree. MCI WorldCom's share of peering traffic continues to grow, with Sprint and AT&T rounding out the top three backbone providers. Moreover, while

[1] As Chairman Kennard recently explained in the context of another combination between an RBOC and an "[u]pstart long distance company," this kind of vertical combination is a "very different combination" from a merger of adjacent RBOCs and presents a "[d]ifferent competitive dynamic"; "we'll put that one on the fast track." *Telephony*, COMMUNICATIONS

the divested MCI backbone (now owned by Cable & Wireless) formerly was the third largest backbone provider, its traffic share has fallen precipitously.

As a result, the Big Three long distance incumbents are on the verge of transferring their oligopoly control of the long distance market onto the Internet. The increasing concentration of control in the hands of the long distance incumbents is of particular concern not just because the likely result is a decrease in competitiveness for the Internet itself, but also because the long distance incumbents are the least likely to permit the development of innovative new services that might compete directly with their traditional long distance business.

GTE Internetworking ("GTE-I"), which is the fourth largest Internet backbone provider and the only top-tier provider that is not controlled by a major long distance incumbent, stands as a critical competitive bulwark against the encroaching long distance oligopoly. As such, it plays a vital role in preserving the competitiveness of the Internet. But GTE-I is at a significant disadvantage compared to the other major backbone providers because it lacks the same mix of a strong national brand and national customer base that the long distance incumbents rely upon to build their marketing efforts.

Ultimately, the combination of GTE's Internetworking business with Bell Atlantic's concentrated and business-rich customer base will afford GTE-I access to precisely the kind of customer base it needs to be a more potent competitor of the Big Three backbone providers. As is discussed further below, the applicants' proposal here will preserve the merged company's ability to achieve the full measure of these benefits once it is able to acquire a controlling ownership interest in GTE-I. In the meantime, an important part of those benefits will be realized

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DAILY, at 7 (Nov. 15, 1999).

immediately, even during the period that GTE-I remains an independent company. Bell Atlantic has already secured long distance relief in New York (representing approximately 30 percent of its region), and the combined company will remain free to offer long distance in all the states outside Bell Atlantic's Northeast region. As a result, GTE-I can immediately engage in beneficial joint marketing arrangements with the combined company, both outside the Bell Atlantic states and in the business-rich New York market (which is *a fortiori* permitted because Bell Atlantic can jointly market even with its own long distance affiliate in New York.). This benefit will steadily increase as Bell Atlantic receives long distance authority in each additional state.

2. Long distance. The merger will also produce a closely related benefit for consumers of long distance services. *See* Pub. Int. Stmt. at 3-4, 18-20; Jt. Rep. at 11-13. Moreover, now that Bell Atlantic has won long distance relief in New York, those benefits will be more immediate and tangible than they were even at the time the merger was announced.

Although the Commission discounted the possibility of any such benefit in the context of the SBC/Ameritech merger, it did so because neither applicant was yet authorized to offer long-distance service. *See SBC-Ameritech Order,* CC Docket No. 98-141, ¶ 303 (1999). Here, of course, Bell Atlantic does have long distance relief in its largest state, accounting for roughly one-third of the long distance business in the Bell Atlantic region. The combined company can also offer long distance in all the states outside the Bell Atlantic region, and GTE has been offering long distance nationwide since 1996. As a result, there will be an immediate long distance benefit here that was not present in that case.

Specifically, the transaction will allow the merged company to use long distance capacity on the facilities-based national long distance network that GTE is deploying (known as the

Global Network Infrastructure) to carry its combined traffic volumes, including traffic originating in New York. It will also allow the merged company to begin offering competitive packages of services to businesses with offices both in New York and in Los Angeles, Seattle, Dallas, Tampa, or other GTE areas. And again, it will allow for immediate local-long distance joint marketing arrangements in New York, including joint marketing with GTE-I. As a result, the merger will make the merged company's combined long distance business a more effective competitor and will speed the deployment of a fourth branded national facilities-based long distance network to compete with the Big Three. This is precisely the kind of pro-competitive development the Commission relied upon as a basis for approving the merger of MCI and WorldCom. *See WorldCom-MCI Order* ¶¶ 36, 42, 51 & n.119.

3. Wireless. The merger will also provide substantial benefits to consumers of wireless services. *See* Pub. Int. Stmt. at 4, 20-21. While this was true at the time the merger was announced, it is all the more true today as a result of the separate merger of Vodafone's and Bell Atlantic's domestic wireless properties. In sharp contrast to the SBC/Ameritech merger, where the Commission discounted the asserted wireless benefits as "speculative and small," *SBC-Ameritech Order* ¶ 5, the wireless benefits here are tangible, immediate and large.

Combining the complementary wireless properties of Bell Atlantic, GTE and Vodafone will create a third national wireless network that can compete effectively in a business where national coverage has proven to be a vital competitive asset. As the Commission itself has emphasized, the growth in demand for national-one-rate wireless service has been "[t]he most dramatic change in the mobile telephone industry" over the course of last year. *See Fourth CMRS Report*, 14 FCC Rcd 10145, 1999 FCC LEXIS 2979 at *19 (1999). Yet today, only two providers, AT&T and Sprint, currently are positioned to provide this service over the long term,[2] because only those two companies have the kind of nationwide footprint necessary to avoid costly roaming charges.[3] AT&T and Sprint therefore currently enjoy a significant cost advantage over regional or other wireless providers that lack the same national reach.[4]

The combined wireless business of the merged company and Vodafone will provide the reach needed to compete effectively with AT&T and Sprint on a national basis. Altogether, the combined wireless business will have licenses capable of serving more than 90 percent of the U.S. population and 49 of the top 50 wireless markets. It will also have a wireless footprint capable of serving some 254 million POPs, which approaches the 264 million that can be reached by AT&T and the 268 million that can be reached by Sprint.[5]

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[2] A third firm, Nextel, owns SMR licenses covering most of the country. But Nextel's ability to compete directly with AT&T and Sprint is compromised by the limited build-out of its network and the technical incompatibility between SMR technology on the one hand, and cellular or PCS on the other.

[3] According to the Department of Justice: "In contrast to other mobile wireless telephone service providers that offer services only on a local or regional basis on their own facilities, both AT&T and Sprint PCS have licenses and facilities in most large metropolitan areas and in many smaller metropolitan areas throughout the country. . . . Both AT&T and Sprint have attempted to exploit this advantage by, among other things, offering a single-rate national plan." *See United States v. AT&T Corp. & Tele-Communications, Inc.*, Proposed Judgment and Competitive Impact Statement, 64 Fed. Reg. 2506, 2511 (1999).

[4] As the Commission itself has explained, "it can be significantly more expensive for regional operators to provide customers with [national-one-rate service] than for national operators. One obvious way for an operator to reduce roaming costs is by acquiring licenses covering as much of the country as possible." *See Fourth CMRS Report*, 1999 FCC LEXIS 2979, at *29-30.

[5] *See* Paul Kagan & Associates, THE 1998 PCS ATLAS & DATABOOK 630 (Jan. 1998).

Moreover, combining the wireless businesses will produce significant cost savings and operating efficiencies. In addition to lowering cost by reducing dependence on costly roaming agreements, the combination will produce system-wide efficiencies associated with common network engineering, management, purchasing, and administrative functions, as well as allow faster and broader deployment of advanced new wireless services. Overall, the combination of the wireless businesses is expected to generate aggregate cost savings with a net present value of $1.9 billion, many of which will reduce incremental costs and therefore will contribute directly to the merged firm's ability to offer competitively priced services. *See* Declaration of Lawrence T. Babbio, Jr. at ¶¶ 2-6 (attached as Exhibit 1).

These savings are real and confirmed by actual experience. When Bell Atlantic and NYNEX merged their wireless businesses, the Commission recognized that "the efficiencies in management and uniform marketing, pricing and sales would be practically impossible without a merger." *See Bell Atlantic-NYNEX Mobile Order*, 10 FCC Rcd 13368, ¶ 46 (1995). And it was right. Within a year following the merger, the merged company had become the industry's low-cost provider by producing synergies in excess even of what had been projected.[6]

4. Local and bundled service offerings. The merger of Bell Atlantic and GTE also will promote competition in the local and bundled services markets in a way that simply was not

[6] *See, e.g.*, J.C. Smith, et al., Prudential Securities, Inc., INVESTEXT RPT. NO. 1659180, *Bell Atlantic - Company Report*, at *3 (Oct. 31, 1995) ("Greater than expected synergies were realized upon completion of the merger, particularly in customer acquisition costs, which declined 12% to $216 per customer."); Bell Atlantic News Release, *Bell Atlantic First Quarter Net Up 13.5 Percent* (Apr. 18, 1996) (citing a 21% reduction in cash expense per subscriber as evidence that the "synergies the joint venture and much larger footprint" created were "greater than expected").

possible with the combination of SBC and Ameritech. *See* Pub. Int. Stmt. at 1-3, 6-14; Jt. Rep. at 18-26.

Whatever the public interest merits of previous mergers, the combination of Bell Atlantic and GTE is fundamentally different. Unlike the SBC/Ameritech deal, the present merger does not involve the combination of adjacent regional Bell companies into a single super-regional monolith. On the contrary, GTE's local service facilities are islands in the other RBOCs' seas that provide a springboard for the merged company's expansion on a national basis into markets outside its traditional telephone service areas.

Indeed, the two companies already have invested enormous sums toward precisely that end, focusing their investments most heavily on the businesses and technologies of tomorrow. GTE already has an established and operational CLEC with approximately 60,000 local customers outside its local service territory, including in 17 of 21 markets the company has targeted for out-of-region expansion. *See* Joint Declaration of Geoffrey C. Gould & Edward D.Young, III ¶¶ 3-4 (attached as Exhibit 2). It also has invested hundreds of millions of dollars in the operations support systems and other assets (including customer acquisitions) needed to compete outside its traditional local service areas. *Id*. Bell Atlantic, in turn, recently announced an equity investment of more than $700 million in Metromedia Fiber Network, which plans to build fiber networks in 50 predominantly out-of-region cities and will provide dark fiber to both Bell Atlantic/GTE and other competing carriers.[7] *Id*. ¶¶ 8-10. GTE also has made enormous investments in Internet POPs and related assets outside its local service areas. These investments

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[7] As a result, this latter investment provides a double benefit since it also will help to pay for the deployment of dark fiber that MFN will sell under existing deals to CLECs such as

ultimately will provide the combined company with facilities, customers, and other product-lines that can be included in a bundled offering with -- and eventually will be a substitute for (as with VOIP) -- traditional telephone service. *Id.* These benefits are further reinforced by the combined company's multi-billion dollar investment in a national wireless business, which will also provide the combined company with facilities, customers, a recognized brand name, and a product that, to an ever increasing degree, will compete directly with landline telephone services. *Id*. ¶¶ 11-12. As a result, the combination of the two companies' massive investments will spur far more effective entry into the markets of other local exchange carriers.

Likewise, these combined investments also will promote competition in the national market for bundled services. Today, the telecommunications business no longer consists of a unitary product or service offering, and competitors are racing to assemble the capabilities to offer consumers a full bundle of telecommunications services nationwide. To date, the companies assembling the capabilities to roll out a national bundled service offering have been the Big Three long distance incumbents. As a result, combining the local, long distance, Internet, and wireless businesses of Bell Atlantic and GTE will create a critical fourth national provider with the reach and mix of services necessary to compete effectively in the emerging national market for bundled services.

B. The Merger Presents No Risk of Countervailing Harms

While the merger of Bell Atlantic and GTE will produce numerous benefits that were not present in the previous SBC/Ameritech merger, it presents none of the risks of harm that the

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Winstar, Allegiance, Focal and Time Warner.

Commission found there. Again, this fact is directly attributable to the fundamental differences between the two mergers.

1. The Merger Will Not Result In Lost LEC-LEC Competition

The Commission's principal concern in its review of the SBC/Ameritech merger, and its central premise for imposing conditions, was its finding that the merging parties would have competed in one another's local exchange markets if they did not merge. As it had in the previous merger of Bell Atlantic and NYNEX, the Commission specifically found that two adjacent RBOCs were among the most significant potential local competitors to one another in certain markets. In both instances, however, the Commission based its conclusion centrally on its determination that the companies had actual plans to compete, exploiting either the advantages of adjacency or the presence of existing relevant facilities (such as cellular properties), together with brand recognition, in one another's major metropolitan markets. *See SBC-Ameritech Order* ¶¶ 56, 66, 78-83, 85, 94-99 (focusing on St. Louis and Chicago); *Bell Atlantic-NYNEX Order*, 12 FCC Rcd 19985, ¶¶ 62, 69, 132 (focusing on New York City).[8] The present merger, however, contrasts sharply with those prior mergers in this key respect.

No plausible case has been made here that Bell Atlantic and GTE, without the merger, would be economically significant local-exchange competitors to one another -- much less "most significant market participants" -- or that they had plans to become significant competitors of one another. Bell Atlantic and GTE have, in fact, shown the contrary. Not only did the companies

[8] In contrast, while the Commission found that Ameritech planned to use its cellular properties in St. Louis to launch landline competition, the Commission found that GTE Consumer Services Inc., which was purchasing Ameritech's cellular properties in St. Louis, did not have "the adjacency, incentive and stated intention" to use such wireless facilities for landline

lack any actual entry plans in one another's local service areas, but simple factors of geography and economics make clear that they are not likely significant potential competitors. *See* Pub. Int. Stmt. at 25-33; Jt. Rep. at 30-35. On the contrary, the potential competition issue only arises in Pennsylvania and Virginia, and even there the two companies are not adjacent to one another in major metropolitan areas like St. Louis or New York City. *See SBC-Ameritech Order* ¶ 69 ("Any loss of potential competition by merger is . . . likely to affect primarily specific metropolitan areas."). Bell Atlantic's service area in those states is concentrated in the urban areas. GTE, in turn, is concentrated in rural and sparsely populated areas that are removed from the urban centers (and therefore present neither attractive entry targets nor a jumping-off point to major urban markets). In short, the critical Commission finding in *SBC-Ameritech* -- of lost significant local service competition attending the merger -- cannot be made here.

2. The Merger Will Not Result in a Loss of Relevant Benchmarks

The Commission's second concern in the SBC/Ameritech review was that the merger would reduce the number of relevant benchmarks available to regulators in assessing the comparative practices of comparable firms, and would therefore frustrate efforts by regulators to implement the market opening provisions of the 1996 Act. *See SBC-Ameritech Order* ¶¶ 57-59, 101. It rested that finding, however, on a conclusion that the merging parties were similarly situated and that, before merging, Ameritech frequently had taken approaches different from the other RBOCs. *Id*. ¶¶ 58-59. The present merger presents a significantly different case.

As the Commission expressly noted, "[c]omparative practices analyses are effective only when the firms under observation are similarly situated," that is, are "comparable firms -- *e.g.*,

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competition. *See SBC-Ameritech Order* ¶ 97.

in their customer base, access to capital, network configuration, and the volume and type of demands from competitors." *Id.* ¶ 160. This finding is particularly relevant here because, while the Commission lumped GTE together with the RBOCs for purposes of its benchmark discussion, the reality is that GTE's predominantly rural, dispersed territories, in which CLEC entry has been relatively slight, severely weaken any comparability needed for sound benchmarking. As Chairman Kennard has said: "GTE always has been treated differently [than the RBOCs] because it is smaller and less geographically focused."[9] Indeed, in Congress, the courts, and the Commission, GTE has for many purposes been treated as more different from than similar to the RBOCs, precisely because its service areas are more dispersed and more rural. *See BellSouth Corp. v. FCC,* 144 F.3d 58, 67 (4th Cir. 1998); *see also* Jt. Rep. at 39-40. Because of these factors, GTE is far more comparable to the smaller independent LECs that the Commission expressly concluded are not good benchmarks for the RBOCs. *See SBC-Ameritech Order* ¶¶ 168-169.

The current merger also is different in another important respect. Because Ameritech frequently had taken positions different from the other RBOCs, the Commission found that it was an especially important benchmark for section 271 purposes. *Id.* ¶¶ 148-149. But GTE is not subject to section 271, and in the intervening period, it is Bell Atlantic itself that has become the benchmark for section 271 purposes; it is the only company that has proven its compliance with section 271's competitive checklist and obtained long distance relief. In short, the Bell

[9] *See Kennard Says FCC Will Seek Sec. 271 Stay, Then "Use Every Tool,"* WASHINGTON TELECOM NEWSWIRE (Jan. 2, 1998).

Atlantic/GTE merger will give rise no loss of meaningful benchmarks comparable to what the Commission found in the SBC-Ameritech proceeding.

3. The Merger Will Not Increase the Risk of Discrimination

The Commission's final concern in its SBC/Ameritech review was that the merger could increase the risk of discrimination because the combination of two large adjacent contiguous areas resulted in the merged company "controlling both ends of a higher percentage of calls." *Id.* ¶ 194. The Commission concluded that the merger increased SBC/Ameritech's "incentive to discriminate against the termination of calls in its region by independent IXCs in order to induce callers at the originating end to choose the incumbent LEC as the interexchange provider." *Id.* ¶ 196; *see also id.* ¶¶ 212-230. Whatever the merits of that theory (and the applicants take issue with its basic premise, *see* Jt. Rep. at 40-49), the present merger presents a very different picture than the SBC/Ameritech combination.

In sharp contrast to that case, the percentage of long distance calls that both originate and terminate in areas served by the merged company will actually be *lower* than that of Bell Atlantic alone. *Id.* at 46 n.112. Whatever problem concerned the Commission in its SBC/Ameritech review is therefore alleviated, rather than worsened, by the present merger. This again is true due to the atomized nature of GTE's local service territories. Precisely because GTE's local service areas are widely dispersed, a large percentage of the traffic that originates in GTE's territories terminates with local exchange carriers other than Bell Atlantic. And, from a practical perspective, the notion that the merged company could coordinate discriminatory activities in those widely dispersed locations without detection is implausible.

The current merger also differs from SBC/Ameritech with respect to the fundamental premise of the 1996 Act regarding long-distance service: a Congressional determination reflected in section 271 that certain LECs, until their "local markets are open," could "discriminate against" rivals. *SBC-Ameritech Order* ¶ 16, 230; *see also id.* ¶¶ 14, 212-24, 229. In that transaction, the entire home regions of both parties were covered by section 271, and neither had proven that their markets were open to local competition pursuant to section 271.[10] In the present merger, by contrast, Congress left GTE's territories outside the section 271 bar altogether, reflecting a material difference in the underlying conditions for the vertical concern behind section 271 (as the courts, at the Government's urging, have found).[11] And the largest single market within Bell Atlantic's service territory -- New York -- has been found by the Commission to be open to competition as required by section 271.

Moreover, just as the Commission's vertical concerns vanish in the context of the present proceeding, so too does its concern that this merger could result in increased discrimination against CLECs. In its SBC/Ameritech review, the Commission was concerned that the incentive to discriminate against CLECs would increase because the merged firm could capture more of the benefits (than either firm would alone) of any discriminatory acts that raise CLEC costs of doing business even outside one of the merging company's service areas. *Id.* ¶¶ 186-193, 195-211. Even assuming the theory is true anywhere, it depends critically on two premises: (1) that the same CLECs will enter both of the merging companies' territories; and (2) that those CLECs will have costs that are common to the several areas at issue. Only where both premises hold true

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[10] *See SBC-Ameritech Order* ¶ 27 ("SBC and Ameritech have separately engaged in failed attempts to convince regulators that their local markets [were] open to competition within the meaning of section 271.") (footnote omitted).

[11] *Cf. BellSouth*, 144 F.3d at 67 ("Because the BOCs' facilities are generally less dispersed than GTE's, they can exercise bottleneck control over both ends of a telephone call in a higher fraction of cases than can GTE.").

can discriminatory conduct that raises a CLEC's costs in one of the merging company's service areas automatically raise those costs in the other.

Here, however, the essential premises are missing. The theory does not apply when a CLEC in one merger partner's service area is not entering at all in the other's areas. Even where entry does occur, the theory steadily weakens as the locales at issue become more scattered and disparate, for the number and likelihood of any "common" CLEC costs (across territories) will be reduced. In this case, it is implausible that a discriminatory act toward a Northeast CLEC will have the theorized effect; the CLEC is unlikely to be entering most of GTE's rural areas at all. And, in any event, it is unlikely to be sharing many, if any, Northeast-region costs with any operations in Los Angeles, Seattle, Dallas, and Tampa. In sum, this aspect of the Commission's concern likewise is substantially lessened, if not altogether absent, in the context of the present merger.

III. THE PROPOSED CONDITIONS WILL PROVIDE STILL FURTHER BENEFITS

As the above discussion makes clear, the merger of Bell Atlantic and GTE satisfies the Commission's public interest standard without any need for conditions. Nonetheless, to create further consumer benefits, the parties are proposing here a comprehensive package of conditions, the detailed description of which accompanies this submission in a separately bound volume, that are patterned closely after those the Commission adopted in the *SBC-Ameritech Order*. We have simply adopted as is the overwhelming majority of those conditions. Of the 30 separate conditions adopted by the Commission, fully 22 either have been adopted in whole or have been superseded by subsequent Commission orders and are therefore no longer required.[12] In a handful of instances that are addressed below, the commitments proposed here vary in certain respects to reflect the fundamental differences between that merger (and the merging parties) and this one. Taken as a whole, these commitments provide public interest benefits over and above those already created by the merger itself. Indeed, the proposed commitments expressly cover each of the five subject areas that were addressed by the conditions adopted in the SBC/Ameritech merger proceeding. *See SBC/Ameritech Order* ¶¶ 145-180.

First, Bell Atlantic and GTE are proposing a series of commitments that the Commission previously concluded will promote the deployment of advanced services. For example, we propose to create a separate affiliate for advanced services, which the Commission found "will provide a structural mechanism to ensure that competing providers of advanced services receive effective, nondiscriminatory access to the facilities and services . . . necessary to provide advanced services," "ensure a level playing field between [the merged company] and its advanced services competitors," and "greatly accelerate competition in the advanced services market . . . while prodding all carriers . . . to hasten deployment." *Id.* ¶ 363. We also propose to establish a "surrogate line sharing discount," which the Commission found will "spur deployment of advanced services . . . while ensuring that these other carriers receive treatment . . . comparable

[12] Specifically, four of the conditions imposed in the SBC/Ameritech proceeding have now been superseded by the Commission's *UNE Remand Order*, CC Docket No. 96-98 (1999). These include the requirement to provide certain specified information for loop qualification purposes, *id.* ¶¶ 426-431; the requirement to provide the so-called unbundled element "platform," *id.* ¶ 261 *et seq*. (defining conditions under which unbundled switching and therefore combinations that include switching must be provided); the requirement to provide certain specified unbundled elements pending the result of the remand proceeding (addressed by release of the *UNE Remand Order*); and the requirement to provide shared transport as an unbundled

to that provided to the [merged company's] separate affiliate." *Id.* ¶ 370. We will provide common electronic pre-ordering and ordering interfaces for facilities used to provide advanced services within their respective regions (and a discount on unbundled loops used to provide advanced services until they do), which the Commission concluded will "guard against discrimination" and lower "rivals' costs of providing competing services." *Id.* ¶ 371. And we will target deployment of their own advanced services to include low-income groups in rural and urban areas, "ensuring that the merged firm's rollout of advanced services reaches some of the least competitive market segments and is more widely available to low income consumers." *Id.* ¶ 376.

Second, Bell Atlantic and GTE are proposing a series of commitments that the Commission previously concluded would ensure that local markets are open, protect against discrimination and promote competitive entry. For example, we propose a comprehensive carrier-to-carrier performance plan (with both measurements and incentive payments) that will provide competitors "additional protections by strengthening [the merged company's] incentive to provide quality of service at least equivalent to the merged firm's retail operations or a benchmark standard." *Id.* ¶¶ 377, 422. We propose to provide uniform interfaces and related business rules that are based on national standards across our respective local service territories within fixed periods of time, to provide special OSS assistance to qualifying competitors at no additional cost, and to adopt the collocation-related conditions, all of which are measures that the Commission concluded "will reduce the cost of entry into the [merged company's] territories." *Id.* ¶ 422. And we propose to provide multi-state interconnection agreements, to provide for

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element in Ameritech states, *id.* ¶ 369.

MFN treatment of agreements entered into by the merged company outside its service territories or in other states inside its territory, which the Commission concluded “should assist competitors in entering new markets within the [merged company’s] region.” *Id*.

Third, the companies propose a minimum investment guarantee to foster out-of-territory competition. As is discussed further below, this commitment is tailored to the particular circumstances presented by this merger, and will ensure that the “merger will form the basis for a new, powerful, truly nationwide multi-purpose competitive telecommunications carrier.” *Id.* ¶ 398.

Fourth, the companies propose a series of commitments to ensure that consumers continue to receive high quality and low cost telephone service. For example, we propose to offer enhanced Lifeline plans, provide additional reports on the quality of services provided to our customers, agree to continue participating in the Network Reliability and Interoperability Council, and either refrain from imposing or eliminate (when AT&T does) mandatory minimum charges for long distance services. *Id.* ¶¶ 400-405.

Fifth, the companies propose specific measures to ensure compliance with their commitments, including the establishment of a self-executing compliance program, an independent audit of the merged company’s compliance, and self-executing remedies for failure to perform an obligation. *Id.* ¶¶ 406-414.

Moreover, to the extent a handful of the proposed conditions vary in certain respects from those adopted in the SBC/Ameritech proceeding, each of those variations is a direct result of, and eminently justified by, differences between that merger and this one.

A. Uniform Interfaces for Access to OSS. The parties are proposing here to establish uniform interfaces and related business rules that are based on national standards within each of their respective regions, and to do so within timeframes that compare favorably with those established in the SBC/Ameritech conditions. The proposed condition, however, varies in two respects from the one imposed there.

1. The parties propose here to establish interfaces that are uniform within their respective service territories, but do not propose to extend that uniformity between their respective territories.[13] There are two reasons.

First, due to the dramatically different heritages of Bell Atlantic and GTE, the two companies' underlying support systems are so vastly different that developing and deploying common interfaces and business rules across the companies is both impracticable and prohibitively expensive. *See* Joint Declaration of Marion C. Jordan & Jerry Holland ¶¶ 8-30 (attached as Exhibit 3) (hereafter "Jordan & Holland Decl."). Because SBC and Ameritech (like Bell Atlantic and NYNEX) both were offspring of the old Bell System,[14] their legacy support systems, while still varying to some extent, were at least broadly similar. *Id*. ¶¶ 8-9. In many instances, they were developed by or in conjunction with Bellcore and, because many of the legacy systems pre-date divestiture, often were manufactured by Western Electric. *Id*. GTE, in

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[13] Because neither Bell Atlantic nor GTE currently provides direct access to its service order processors, the commitment by SBC/Ameritech to extend SBC's pre-merger practice of providing such access following the completion of the merger is not relevant here.

[14] Even SNET was partially owned by AT&T and enjoyed the benefits of its association with the Bell System prior to divestiture.

contrast, grew out of an assemblage of independent telephone companies, never was part of the Bell System, and developed its own very different systems. *Id*. ¶¶ 10-12.

Second, imposing such a requirement would do at least as much harm as good. In *SBC/Ameritech*, the uniform interface was designed to make up for a loss of local competition in the merging companies' adjacent regions, and served to provide uniformity in a large geographically contiguous region across the middle of the country. *See SBC-Ameritech Order* ¶¶ 371-372, 381-383. In contrast, the merger of Bell Atlantic and GTE results in no lost LEC-to-LEC competition and, just as critically, does not involve anything like the creation of a massive geographically contiguous territory. On the contrary, as has often been noted in specifically distinguishing GTE from the Bell companies, GTE serves a highly dispersed collection of areas across the country that are mostly distant from Bell Atlantic's service territory in the Northeast. As a result, there is no meaningful class of regional CLECs naturally addressing the combined Bell Atlantic/GTE areas.[15] And many of the CLECs that do compete with the respective companies already have designed their own systems to work with the differing interfaces that the respective companies already have deployed. *See* Jordan & Holland Decl. ¶¶ 22-30. Indeed, even national carriers like AT&T and MCI WorldCom have expressed grave concerns in state proceedings that Bell Atlantic and GTE might move to uniform systems and thereby undo the

[15] In fact, the only states that Bell Atlantic and GTE both serve are Pennsylvania and Virginia. Even there, however, GTE serves largely rural and suburban franchises with only about 600,000 and 700,000 access lines respectively. Not surprisingly, therefore, competing carriers have chosen not to enter those GTE territories on any significant scale. Yet, providing uniform interfaces and business rules across the Bell Atlantic and GTE service territories in those states would require the expenditure of much of what it would cost to do so nationwide. *See* Jordan & Holland Decl. ¶ 27. That kind of massive expenditure simply cannot be justified for such a negligible gain.

work that those carriers already have done to obtain access to each of the merging companies' separate and very different systems.[16] Accordingly, a requirement to establish uniformity between the Bell Atlantic and GTE service territories likely will do far more harm than good.

2. In the case of both Bell Atlantic and GTE, existing procedures are already in place for implementing changes or enhancements to the companies' interfaces that provide for participation by competing carriers. In Bell Atlantic's case, for example, OSS collaboratives have been conducted previously in both New York and New Jersey, and the results extended to other states insofar as they were relevant. *See* Jordan & Holland Decl. ¶¶ 32-42. Moreover, Bell Atlantic has participated in a collaborative process designed specifically to produce common interfaces and business rules across its entire region, and that provided for participation by all interested CLECs. *Id*. It also has in place a formal change management process to implement changes and enhancements to its interfaces, which was created under the auspices of the New York PSC. *Id*. Likewise, GTE has in place a formal change management process that was developed jointly with competing carriers under the auspices of the California commission to

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[16] *See In re Joint Application of GTE Corp. and Bell Atlantic to Transfer Control of GTE's California Utility Subsidiaries*, Proposed Decision of ALJ, App. 98-12-005, at 128 (Calif. PUC Dec. 1999) ("AT&T, for example, contends that the proposed merger threatens to disrupt critical ongoing negotiations between AT&T and GTE, and separate critical negotiations between AT&T and Bell Atlantic, relating to OSS."); *id*., at 130 ("AT&T and MCI say the applicants are grappling with how to integrate their vastly different systems, and that this threatens to undo much of the work AT&T and MCI have accomplished to obtain operational OSS from each applicant. Applicants, however, do not expect any operational consolidation from the merger.").

implement changes and enhancements to its interfaces. *Id*. ¶¶ 43-49. Changes made in California routinely are extended to GTE's entire service territory.[17]

As a result, to the extent that issues relating to the implementation of this commitment already have been addressed in collaborative proceedings, Bell Atlantic and GTE do not propose to revisit them in new collaboratives. To the extent that issues previously have not been dealt with, however, the parties will institute a collaborative procedure as described further in the attached commitments. These procedures provide for participation by competing carriers and a mechanism for timely resolution of disputes.

B. Carrier-to-Carrier Performance Plan. Bell Atlantic and GTE propose to establish a comprehensive carrier-to-carrier performance plan that parallels the one adopted in the SBC/Ameritech proceeding. The performance plan itself simply replicates the one established there in all material substantive respects, and the remedies provided for under the plan proposed here are directly proportionate to the remedies adopted there. In that case, however, the actual measurements that feed into the plan were based upon measurements that were established for SBC in Texas. Here, the parties propose to substitute the measurements developed in California for use in the GTE states, and the measurements developed in New York for the Bell Atlantic states.[18] Doing so will merely ensure that the measurements are designed

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[17] In addition, Bell Atlantic and GTE will adopt the change management process currently in place in New York for use in all their states, subject to any necessary state approvals.

[18] In a few instances, the California measurements were modified to conform more closely to definitions or disaggregation levels specified in the New York measurements. In Bell Atlantic's case, these measurements also would replace the less comprehensive set of measurements it currently reports as a result of its commitments in connection with the Bell Atlantic/NYNEX merger. *See Bell Atlantic-NYNEX Order*, Appendix C. In GTE's case, the

to match the systems and services of the specific companies involved in the merger here (rather than SBC's). It also will avoid creating yet another set of burdensome reporting requirements that inevitably would generate confusion for all concerned to the extent they vary from those reported as a result of comprehensive state commission proceedings.

C. Expanded Most Favored Nation Treatment. Bell Atlantic and GTE also propose to grant expanded most favored nation treatment that tracks the conditions adopted in SBC/Ameritech. As was true there, an interconnecting carrier anywhere in Bell Atlantic/GTE's local service territory will be able to adopt terms that the merged company negotiates with another local exchange carrier anywhere outside the company's local service territory following the merger. Likewise, an interconnecting carrier anywhere in Bell Atlantic/GTE's local service territory will be able to adopt terms that the merged company negotiates with a competing carrier anywhere inside the merged company's local service territory following the merger. And, like there, an interconnecting carrier will be able to adopt terms that Bell Atlantic or GTE negotiated with a competing carrier in their respective service areas prior to the merger under certain conditions.

The condition proposed here, however, varies in one respect from the condition adopted in the SBC/Ameritech proceeding. There, competing carriers could adopt the terms of an agreement from another state that was negotiated prior to the merger only to the extent that the incumbent carrier that signed the agreement was an affiliate of the acquiring company (SBC) at the time the agreement was negotiated. The theory, quite properly, was that the acquiring

performance plan terminates in 3 years when the proposed conditions sunset, rather than upon gaining section 271 relief (when the SBC/Ameritech plan terminates) because GTE is not subject company should not be bound by terms that were agreed to in other states at a time when it had no say over those terms. Here, in contrast, the merger is a true merger of equals and not an outright acquisition. As a result, applying the same principle here, neither of the merging parties should be bound by terms agreed to in other states prior to the merger and over which they had no say. Accordingly, the proposed conditions here would allow an interconnecting carrier in a GTE state to adopt terms from agreements negotiated prior to the merger in any other GTE state, while an interconnecting carrier in a Bell Atlantic state could adopt terms from agreements negotiated prior to the merger in any other Bell Atlantic state.

D. Carrier-to-Carrier Promotional Discounts. In the SBC/Ameritech proceeding, the parties volunteered (and the Commission accepted) to provide promotional discounts on residential unbundled loops and resale services subject to a number of limitations. As the Commission made clear in its order, however, the purpose of those discounts was "[t]o offset the loss of probable competition between SBC and Ameritech for residential services in their regions" as a result of their merger. *See SBC/Ameritech Order* ¶ 390. Here, in contrast, neither Bell Atlantic nor GTE planned to compete with one another for residential services, nor, given the nature of their service territories, is it plausible to suggest that they would have absent the merger. Accordingly, there is no loss of residential competition to offset, and no reason to propose (or accept) such a condition here.

E. Out of Territory Competitive Entry. Likewise, in the SBC/Ameritech proceeding, the parties volunteered conditions establishing a specific timeline for the implementation of their so-called National-Local Strategy, along with incentive payments tied

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to section 271.

directly to meeting that timeline. They did so for the simple reason that, unlike here, their out-of-region entry plans were the single key basis for their argument that the merger would promote competition and was in the public interest. The Commission, however, concluded that the asserted benefits, at least in the context of that case, were not merger specific, and that the magnitude of the benefits was speculative and smaller than the applicants claimed. *Id.* ¶¶ 270, 303, 306, 313, 439. The Commission therefore attached less weight to the parties' plans or their proposed condition in evaluating the relative public interest benefits and harms from the merger than it did to other factors. *Id*.

In view of that history, the significant pro-competitive benefits for consumers of Internet, long distance, and wireless services that will result from this merger but were not present there, and Bell Atlantic/GTE's differing business plan, the parties here have not attempted to duplicate the out-of-territory commitment volunteered by SBC and Ameritech. There, the parties effectively committed to a minimum guarantee to ensure that they would continue their out-of-region effort, tying it to deployment of circuit switches that formed the basis of their business plan. Here, the parties can point to what they have already done in furtherance of their plan to assemble the assets needed to compete nationwide, rather than what they will do. GTE has an operational CLEC and has invested large sums in support systems and other assets needed to compete outside its territory. Since this merger was announced, Bell Atlantic and GTE have announced the addition of Vodafone's domestic wireless properties to create a national wireless competitor to rival AT&T and Sprint. Bell Atlantic has announced its investment in Metromedia Fiber Networks. And GTE has continued to invest in the growth of GTE-I's Internet backbone and data business.[19] For all these reasons, the particular commitment made by SBC and Ameritech is inapplicable here.

Given their broad mix of assets and the rapid rate of technological change, Bell Atlantic and GTE need the flexibility to pursue a range of technologies, markets, and marketing approaches as they prove to be efficient. The applicants therefore are not making the same commitment as SBC/Ameritech. Instead, the parties are proposing an out-of-territory commitment that is tailored to the particular circumstances of their merger. Specifically, within three years of the merger's close, the companies propose to spend a total of not less than $500 million to provide services outside their franchise areas that compete with the traditional telephone services provided by incumbent local exchange carriers, or to provide advanced services to mass market customers. At least half of these expenditures must be for facilities that are used to provide competitive local services, or to provide other services that are offered jointly with competitive local services, or for ventures that promote competitive local services, while other expenditures may be used to acquire customers for competitive local services. Given the rapid pace of technological change, however, the commitment is expressly made technology

[19] This existing out-of-territory investment by Bell Atlantic and GTE already surpasses the amount of investment required by the SBC/Ameritech commitments, and the merged company will have a larger out-of-territory customer base than the parties agreed to there. Further, it is in the merged company's interest to continue to invest where and as it is economically justified as Bell Atlantic/GTE continues to assemble the geographic reach and service mix necessary to compete with national providers like AT&T, MCI and Sprint. Under similar circumstances in other recent mergers, such as the merger of AT&T and TCI, the Commission has declined to impose *any* conditions requiring the merging parties to undertake specific entry steps. *See TCI-AT&T Order*, CS Docket No. 98-178, 14 FCC Rcd 3160, ¶ 139 (1999) (relying on parties' plans to roll out competing local telephone service where economically justified).

neutral in order to allow the parties to devote their resources to evolving technologies.[20] And to ensure that the parties follow through on their commitment, the proposal requires the parties to make payments to the U.S. Treasury equal to 150 percent of any shortfall.

F. InterLATA Services Pricing. In *SBC/Ameritech*, the merging parties (neither of which yet had authority to provide in-region long distance) committed not to institute mandatory minimum charges on interLATA calls. Bell Atlantic only recently entered the in-region long distance market in New York, did so without instituting mandatory minimums, and is willing to commit to not institute such minimums elsewhere. GTE, in contrast, has been in the long distance business since 1996 and has such charges in place today. Nevertheless, GTE is willing to terminate its mandatory minimums provided only that it is not disadvantaged in comparison to the major long distance incumbents by doing so. Accordingly, GTE will commit to eliminate mandatory minimum charges at such time as the market leader, AT&T, does the same.

IV. BELL ATLANTIC/GTE WILL FULLY COMPLY WITH SECTION 271

Bell Atlantic/GTE will ensure that the merged company is in full compliance with all the requirements of section 271. Before the merger closes, GTE will unilaterally exit certain businesses to the extent prohibited to Bell Atlantic, including resold voice long distance service within Bell Atlantic's non-271-approved states. With respect to the Internet backbone and related data businesses of GTE-I, GTE will eliminate the 271 issue by transferring GTE-I to a separate public corporation in which Bell Atlantic/GTE will own only a 10% interest with an option to

[20] *See* Daniel Reingold, CS First Boston Equity Research (Jan. 25, 2000) (analyst report predicting that "out-of-region conditions (if any) . . . will focus on BEL's continuing to build out its data/internet and/or wireless businesses out of region. This would be more logical than the requirements imposed on SBC to serve 3 customers in each of 30 markets within 3 years using

increase its interest once it receives sufficient interLATA relief to operate the business. The remainder of this section addresses the structural solution for GTE-I and explains why this solution fully satisfies the legal requirements and policy objectives of section 271.

old-world technology (i.e., wireline circuit switches).").

A. GTE-I Will Be Transferred to a Separate Corporation ("DataCo") That Will Be 90% Owned and Controlled By Public Shareholders Pending InterLATA Relief.

Bell Atlantic/GTE will eliminate the section 271 issue that would arise from Bell Atlantic's ownership of GTE Internetworking through the following structure:

GTE will transfer substantially all of GTE-I's existing nationwide data business into a corporation ("DataCo") that will be publicly owned and controlled. Through an initial public offering, or "IPO," public shareholders will purchase shares of DataCo Class A common stock, which will initially carry 90% of the voting rights and the right to receive 90% of any dividends or other distributions. In exchange for the transfer of GTE-I, the merged Bell Atlantic/GTE will receive shares of Class B stock of DataCo that will have 10% of the voting rights and the right to receive 10% of any dividends or other distributions. Bell Atlantic/GTE will also have the option in the form of conversion rights to increase its ownership in the future once it receives sufficient interLATA relief to operate the business. The Class B shares will be convertible into shares that will represent 80% of the outstanding shares following conversion, assuming no additional shares are issued in the interim. That percentage will be reduced when DataCo issues additional shares.

The Bell Atlantic/GTE merger would close as soon as all Class A shares have been irrevocably transferred to one or more investment banks for purposes of conducting the IPO. Depending on the status of the IPO documents filed with the Securities and Exchange Commission and the conditions in the securities markets, the IPO either will be carried out immediately upon transfer or the shares will be transferred to a consortium of at least three banks for sale to the public at a later date. The consortium of banks, acting at the direction of DataCo's independent board, will carry out the IPO when the SEC has declared the IPO filings effective and when the DataCo board determines that market conditions are appropriate, but in no event later than 150 days after the shares are transferred to the banks.

Subject to normal corporate requirements and the investor safeguards described below, at any time after the IPO, DataCo will have the ability to issue additional Class A shares (for example, to fund acquisitions or major business initiatives), and it is expected that DataCo will do so. In the event that additional Class A shares are issued, the conversion of the Class B shares will give Bell Atlantic/GTE less than an 80% economic interest in DataCo. However, the shares into which the Class B shares are convertible will have enhanced voting provisions that are likely to preserve Bell Atlantic/GTE's voting control following conversion even if additional shares have been issued.

Bell Atlantic/GTE's conversion rights will only be exercisable within five years from the closing of the merger. If it has failed to receive sufficient interLATA relief to operate the business, Bell Atlantic/GTE will either sell its Class B stock (which includes the conversion rights) or exercise the conversion rights for the purpose of disposing of its interest in DataCo or any assets that are prohibited to Bell Atlantic/GTE under section 271 or otherwise bringing DataCo's business into compliance with applicable law. Bell Atlantic/GTE will have the right to sell all or part of its Class B shares at any time. To the extent Class B shares are purchased by someone who is not subject to the section 271 restrictions, that purchaser would be free to convert those Class B shares immediately.

Until Bell Atlantic/GTE exercises its option, DataCo will be independent of Bell Atlantic/GTE. DataCo will have an independent board of directors that is periodically elected by the voting shareholders consistent with the requirements of applicable corporation laws. The board will have 10 members. One member will be the CEO of DataCo and eight of the remaining nine directors will be outside directors who will have no affiliation with Bell Atlantic or GTE. At least five of the unaffiliated directors will be up for election within six months after completion of the IPO. The tenth director will be elected by a class vote of the Class B shares and will not be eligible to serve as chairman. The board and officers of DataCo will owe fiduciary duties to the public shareholders. Incentive compensation for DataCo's managers will be tied to the performance of DataCo and the value of DataCo's publicly traded stock, not to the financial performance or stock value of Bell Atlantic/GTE. The initial source of financing for DataCo will be the proceeds from the sale of Class A stock in the IPO. Any additional funding required by DataCo during the interim would be raised from the public markets, possibly by issuing additional Class A shares, or by arm's-length commercial loans from Bell Atlantic/GTE.

Bell Atlantic/GTE's interests as a minority investor and holder of an option to acquire a controlling interest in the future will be protected by certain reasonable investor safeguards that are both typical of the rights commonly held by option holders or other prospective acquirers and modeled on investor protections that have regularly been permitted by the Commission. These will include the right to approve certain fundamental business changes that adversely impact the value of Bell Atlantic/GTE's minority investment and conversion rights, including a change in control of DataCo or the sale of a significant portion of its assets. The investor safeguards we expect to include are listed in Schedule A, appended hereto.

The DataCo solution will fully preserve the integrity and competitiveness of GTE-I's existing business while also preserving Bell Atlantic/GTE's ability (contingent on interLATA relief) eventually to reacquire control of DataCo and bring to market the full range of long-term Internet and data benefits promised by the merger. In the meantime, this solution will enable customers to begin realizing immediately some of these important data benefits, since a significant portion of DataCo's business will be outside the Bell Atlantic region or in in-region states where Bell Atlantic has achieved 271 relief. Accordingly, during the period before the option is exercised, Bell Atlantic/GTE will market DataCo services (or the two companies will market their services jointly) as and where permitted by law. For example, in New York, where Bell Atlantic has already received 271 approval, Bell Atlantic/GTE and DataCo will jointly market DataCo's Internet connectivity services.

All commercial interactions between Bell Atlantic/GTE and DataCo will be conducted pursuant to commercially reasonable contracts. This is consistent with the fact that DataCo and Bell Atlantic/GTE will each be independent public corporations whose directors and officers will owe duties of care and loyalty to their respective shareholders. These contracts will encompass the marketing arrangements discussed above as well as certain administrative support services that DataCo may require from Bell Atlantic/GTE. Schedule B, appended hereto, describes in further detail the commercial contracts between Bell Atlantic/GTE and DataCo.

B. Until Bell Atlantic/GTE Attains InterLATA Relief and Exercises Its Option, DataCo Will Not Be an "Affiliate" Under Section 271.

Section 271(a) generally prohibits a Bell operating company, or "BOC," from providing interLATA telecommunications originating in an in-region state, whether directly or through an "affiliate," until the BOC has received authority to do so under section 271(b). 47 U.S.C.

§ 271(a). The controlling definition of "affiliate" set forth in section 3(1) of the Communications Act, 47 U.S.C. § 153(1), provides:

> The term "affiliate" means a person that (directly or indirectly) owns or controls, is owned or controlled by, or is under common ownership or control with, another person. For purposes of this paragraph, the term "own" means to own an equity interest (or the equivalent thereof) of more than 10 percent.

Under the structure described above, Bell Atlantic/GTE will not own or control DataCo before attaining interLATA relief, and thus DataCo will not be an "affiliate" of Bell Atlantic/GTE's BOCs within the meaning of section 3(1).

1. Bell Atlantic/GTE Will Retain Only a 10% Equity Ownership Interest Pending InterLATA Relief and Thus Will Not "Own" DataCo.

Pending interLATA relief, Bell Atlantic/GTE's equity ownership interest in DataCo will not exceed the permissible 10% level, and thus Bell Atlantic/GTE will not "own" DataCo for purposes of the Communications Act.

Section 3(1) of the Act is concerned with "ownership" of "equity interests." The ownership of an equity interest in a corporation is represented by stock, and the primary indicia of equity ownership conferred by stock include voting control over the corporation's management and a right to participate in residual earnings through a distribution of dividends. *See* 11 Fletcher's Cyclopedia of the Law of Private Corporations § 5081 (perm. rev. ed 1995) (citing authorities); *Paulsen v. Commissioner*, 469 U.S. 131, 138 (1985) ("equity characteristics" of shares include "the right to vote on matters" and the right to "receive dividends . . . paid out of net earnings").

Here, the public shareholders of DataCo will hold 90% of the voting rights in DataCo and will be entitled to receive 90% of any dividends or other economic returns derived from DataCo during the period before Bell Atlantic/GTE exercises its option. Bell Atlantic/GTE will own only 10% of the voting rights and will be entitled to receive only 10% of any interim dividends paid by DataCo. Moreover, Bell Atlantic/GTE will not receive any tax benefits resulting from net operating losses incurred by DataCo during the interim and will receive no other current financial benefit or economic return from its limited stake in DataCo. Accordingly, before obtaining interLATA relief, Bell Atlantic/GTE will not "own an equity interest" in DataCo of more than 10% under the traditional indicia of equity ownership.[21]

The fact that Bell Atlantic/GTE will also hold an option to convert its 10% ownership interest into an 80% interest in the future, once it receives sufficient interLATA relief, does not mean that Bell Atlantic/GTE will own a greater than 10% equity interest in DataCo before the option is exercised. The traditional rule of property law is that "a mere option to purchase land does not vest the holder of an option with any interest, legal or equitable, in the land." *Todd v. Citizens' Gas Co.*, 46 F.2d 855, 866 (7th Cir. 1931). Thus, as the Commission itself has recognized, options, warrants and other convertible securities are nothing more than "potential future equity interests." *Biennial Review of Spectrum Aggregation Limits*, Report and Order, WT

[21] Similarly, Bell Atlantic/GTE will not own the "equivalent" of an equity interest above 10% within the meaning of section 3(1). The parenthetical phrase "(or the equivalent thereof)" in section 3(1) is reasonably read to encompass ownership interests that may not carry the voting rights or usual form of common stock but that still carry the traditional economic rights of equity ownership, including, most importantly, the right to receive a share of current profits. Such interests may include partnership shares or instruments nominally characterized as debt, such as promissory notes, that in fact entitle the holder to receive a pro-rata distribution of current profits, not simply an interest payment. *Cf., e.g., Fox Television Stations, Inc.*, 11 FCC Rcd 5714, ¶¶ 14-18 (1995) (foreign entity held to own more than 25% of capital stock of domestic broadcast licensee by virtue of promissory notes that entitled foreign entity to receive 99% of current profits). Because Bell Atlantic/GTE will be entitled to receive only 10% of current profits or

Docket No. 98-205, ¶ 8 (Sept. 22, 1999). *See In re Woods Communications Group*, 12 FCC Rcd 14042, ¶¶ 13-14 (1997) (characterizing options as "future equity holdings" and "possible equity interests").

Consistent with the general legal rule, options and other rights to acquire *future* equity interests, such as the conversion rights Bell Atlantic/GTE will have, do not count as ownership interests in determining affiliate status under section 3(1). The plain terms of section 3(1) and all relevant precedents establish that only *current* equity interests count against the 10% limit. Section 3(1) is written in the present tense ("owns," "is owned," "is under common ownership"). The plain terms of the statute thus indicate that only *current* ownership interests, as opposed to *future* interests like options and other conversion rights, are to be taken into account in determining compliance with the 10% ownership ceiling.

This reading is borne out by Commission precedent applying section 3(1). In *In re Time Warner Cable*, 12 FCC Rcd 23363 (1997), the Cable Bureau ruled that Bell Atlantic did not "own an equity interest (or the equivalent thereof) of more than 10 percent" in CAI Wireless, a multichannel video programming distributor, even though Bell Atlantic owned "7,000 shares of CAI Senior Preferred Stock, which are unilaterally convertible into shares of CAI Voting Preferred Stock, which are then unilaterally convertible into shares of CAI Common Stock." *Id.* § 4. Although Bell Atlantic had the right to convert its preferred shares into voting shares at will, which would give it a greater than 10% ownership interest in CAI, the Cable Bureau nevertheless agreed that "debt and instruments such as warrants, convertible debentures, options or other

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other economic returns of DataCo pending interLATA relief, Bell Atlantic/GTE will not own the "equivalent" of an equity interest of more than 10%.

non-voting interests with rights of conversion to voting interests" do not count as equity interests "unless and until conversion is effected." *Id.* § 8 (quotation marks omitted).[22]

In all other contexts where (as with section 271) the Commission enforces ownership attribution limits in order to safeguard competition, the Commission has consistently ruled that options and other convertible interests do not count as ownership:

- In its broadcasting and cable attribution rules, the Commission has concluded that call options and convertible rights are not cognizable ownership interests. *E.g.*, *Review of the Commission's Regulations Governing Attribution of Broadcast and Cable/MDS Interests*, MM Docket No. 94-150, at ¶ 2 n.4 (1999) ("The following corporate interests are not currently attributable: minority stockholdings in corporations with a single majority shareholder; nonvoting stock; other nonvoting instruments such as options or warrants; and debt."); *Attribution of Ownership Interest*, 97 F.C.C. 2d 997 (1984) (adopting 47 C.F.R. § 73.3555) ("Holders of debt and instruments such as warrants, convertible debentures, options or other non-voting interests with rights of conversion to voting interests shall not be attributed unless and until conversion is effected."); *In re Implementation of 1992 Cable Act*, CS Docket No. 98-82, at ¶ 129 n.329 (1999) ("We disagree . . . that options, warrants, and convertible debentures should generally be treated as beneficial interests under our rules creating an attribution . . . . We do not believe that these types of securities demonstrate . . . current, active participation.") The Commission adopted these attribution rules to ensure that competition is not impaired through undue concentration of ownership. Specifically, the cable attribution rules, like section 271's limitations on affiliated ownership, "are designed to promote competition by ascertaining the minimum interest necessary for one entity to potentially influence another." *Id.* ¶ 128. Nevertheless, the Commission concluded that options, convertible rights and other such future interests "exist outside the concerns and constraints of the multiple ownership rules." 97 F.C.C. 2d 997, at ¶ 48.

- In applying the CMRS spectrum aggregation cap, the Commission has concluded that "securities affording potential future equity interests," such as options, warrants and conversion rights, are not deemed attributable until exercised. 47 C.F.R. § 20.6(d)(5); *see also 1998 Biennial Regulatory Review, Spectrum*

[22] Whatever its precise meaning, the phrase "(or the equivalent thereof)" in section 3(1) certainly does not expand the plain terms of the statute to encompass potential future equity interests. This phrase must be interpreted in a way that preserves the substantive distinction between current and future equity ownership.

Aggregation Limits for Wireless Telecommunications Carriers, WT Docket No. 98-205, ¶ 8 (1999). The CMRS spectrum cap rules, just like section 271, are intended to promote competition and ensure that large wireless carriers do not "exclude efficient competitors, . . . reduce the quantity or quality of services provided, or . . . increase prices to the detriment of consumers." *Id.* § 9.

- Under the LEC/LMDS cross-ownership prohibition, "[d]ebt and interests such as warrants and convertible debentures, options, or other interests (except non-voting stock) with rights of conversion to voting interests shall not constitute attributable interests unless and until conversion is effected." *Local Multipoint Distribution Service and Fixed Satellite Services*, 12 FCC Rcd 12545 (1997) (adopting 47 C.F.R. § 101.1003(e)(5)). This cross-ownership provision prohibits incumbent LECs, including BOCs, from owning an LMDS license in-franchise. The purpose of the restriction, again, as with section 271, is to ensure that incumbent LECs do not accumulate ownership interests that might allow them to exclude or handicap competitors. *Id.* ¶ 159.[23]

The same approach applies to statutory ownership prohibitions, as distinct from Commission-created attribution rules that are subject to waiver. In 47 U.S.C. § 310(b)(4), for example, Congress prohibited the Commission from granting a license to any corporation directly or indirectly controlled by an entity "of which more than one-fourth of the capital stock is owned of record or voted by aliens." In enforcing this statutory ban, the Commission has concluded that

[23] Both the spectrum cap and LMDS attribution rules allowing convertible securities contain a parenthetical exception for "non-voting stock." *See* 47 C.F.R. §§ 20.6(d)(5) ("(except non-voting stock)"), 101.1003(e)(5) (same). This exception does not mean that the Commission considers a convertible interest in stock to be fully attributable before the conversion rights are exercised. Rather, it simply means that current ownership of stock *in excess of the relevant equity threshold* will be attributable, whether or not the stock carries voting rights. This meaning is made clear by the history of these rules, which were both based on attribution rules developed in the PCS context. *See Amendment of the Commission's Rules to Establish New Personal Communications Services*, 9 FCC Rcd 4957 (1994). There, the Commission decided that non-voting stock exceeding the relevant equity threshold would be attributable, and, in discussing convertible interests, stated that "consistent with other multiple- and cross-ownership attribution standard[s], convertible debt instruments or options *with rights of conversion to equity interests* shall not be attributed unless and until conversion is effected." *Id.* ¶ 119 (emphasis added). Thus, the relevant issue for attribution purposes is the extent of the current economic interest represented by the equity held, not the extent of its convertibility.

"future interests, such as options and convertible rights, are not relevant to our alien ownership determinations until converted." *BBC License Subsidiary*, 10 FCC Rcd 10968, ¶ 20 n.12 (1995); *see also In re GWI PCS, Inc.*, 12 FCC Rcd 6441, ¶ 10 (1997) ("Future interests are also not factored into Section 310(b) determinations."). The Commission has adhered to this approach even in cases where the foreign entity holds an option "to reacquire . . . stock in a licensee or the parent of a licensee," since the Commission recognizes that such an option does not constitute an ownership interest "until it is exercised." *In re DCR PCS, Inc.*, 11 FCC Rcd 16849, ¶ 24 (1996).

It makes no difference to this analysis that Bell Atlantic/GTE may exercise its option without any additional payment. Consideration for the option will be given up front through Bell Atlantic/GTE's contribution of its interests in GTE-I to DataCo. Regardless of an option's exercise price, for attribution purposes, the Commission has ruled that there is "[n]o presumption that an option will be exercised." *WWOR-TV, Inc.*, 6 FCC Rcd 6569, n.13 (1991). Thus, for example, in *In re Richard R. Zaragoza*, 14 FCC Rcd 1732 (1998), the Mass Media Bureau, applying the Commission's newspaper/broadcasting cross-ownership rules, permitted a newspaper publisher to hold an option to purchase a 49% interest in the parent company of a prohibited television station notwithstanding the fact that the publisher paid $53,800 for the option up front and could exercise the option at any time for a token payment of $100. The Bureau concluded that such "purchase options and other potential future rights are noncognizable for current attribution purposes," regardless of whether any additional payment is required to exercise the option rights. *Id.* at 1737. The Bureau reasoned that the "up-front" nature of the option payment did not warrant a deviation from our normal policy regarding attribution of options" because "[t]he payment does not change the fact that the option may not be exercised." *Id.* Here, too, there is a possibility that Bell Atlantic/GTE may choose not to exercise its option for economic or business reasons. Moreover, Bell Atlantic/GTE may not receive the interLATA relief required to own and operate DataCo. If it does not receive sufficient interLATA relief to operate the business, Bell Atlantic/GTE will either have to sell its convertible interest in DataCo or exercise the option and take steps to ensure that its ownership of DataCo complies with the law.[24]

A significant body of relevant legal precedent under the Modification of Final Judgment, or "MFJ," the direct legal antecedent to section 271, also confirms that Bell Atlantic/GTE's option will not amount to ownership and will not make DataCo an affiliate. Judge Greene and the Department of Justice repeatedly approved the BOCs' holding options and other conditional interests in prohibited businesses, and these conditional interests were specifically approved as a way to allow the BOCs to preserve particular business opportunities while seeking the necessary waiver of MFJ prohibitions. *See United States v. Western Elec. Co.*, No. 82-0192

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[24] The only situation in which the Commission has treated options as attributable interests is in the spectrum auction context. *See, e.g.*, 47 C.F.R. § 1.2110(b)(2); *id.* § 22.223(d)(5) (Public Mobile Services); *id.* § 24.709(a)(7) (C and F Block Licenses); *id.* § 95.816 (218-219 MHz Service); *id.* § 101.1112 (LMDS); *id.* § 101.1209 (38.6-40.0 GHz Band). That context is very different from section 271 or other contexts where the focus is on protecting competition. In the spectrum auction context, concerns about the *long-term* structure of the industry are paramount -- for example, the auction rules are designed to foster the development of greater diversity among license holders. Where the focus is on long-term industry structure, contingent or future ownership interests will be taken into account. Where competition is the concern, on the other hand, eliminating *current* ownership and control is sufficient, and contingent future interests like options are permitted. Thus, for example, the federal Clayton Act, which governs the antitrust analysis of mergers, *does not* regulate the purchase of an option or other convertible interest, only the "subsequent conversions of convertible voting securities." *See* 16 C.F.R. § 802.31 (Hart-Scott-Rodino reporting regulations).

(D.D.C. Aug. 7, 1986) ("Conditional Interest Order") (setting forth standards for approval of conditional interests);[25] Report of the United States Concerning Proposed Purchase by NYNEX Corp. of a Conditional Interest in Tel-Optik, Ltd. at 8 (June 20, 1986) ("DOJ Tel-Optik Report") ("we agree" that a BOC may acquire a contingent interest "to preserve the right to purchase the [prohibited] stock upon FCC approval and grant of a waiver application by the Court").[26]

The conditional interests approved under the MFJ typically involved the right to exercise an option (or convert debt to equity) where the price of the option or conversion rights was established, or even paid, in advance. *See*, *e.g.*, DOJ Tel-Optik Report at 5-6 (NYNEX would acquire a 50% interest in an interLATA cable system by repaying a 50% share of the actual construction debt to be incurred); Letter from Kenneth E. Millard to Barry Grossman, DOJ, at 3 (Sept. 16, 1986), attached to Report of the United States to the Court Concerning Procedures for Approval of Conditional Interests and Ameritech's Acquisition of a Conditional Interest in Corporation X (Sept. 19, 1986) ("Millard Letter") (funds invested up front for research and development were convertible into a fixed amount of stock defined as "the same number of shares of preferred stock . . . as the total of the development funds expended . . . up to $2.5 million would purchase in a pending preferred equity round of financing"); Letter from Thomas

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[25] Judge Greene's Conditional Interest Order was reversed on procedural grounds not relevant here. *See United States v. Western Elec. Co.*, 894 F.2d 430 (D.C. Cir. 1990). Nevertheless, the order spawned a body of precedent concerning options and other conditional interests that is directly relevant.

P. Hester to Nancy C. Garrison, DOJ, at 2-3 (July 7, 1987), attached to Report of the United States to the Court Concerning Ameritech's Acquisition of a Contingent Interest (July 15, 1987) ("Hester Letter") (initial option price was $5 million plus potential additional payments of up to $10 million; no additional payment was required to exercise the option).

These MFJ-approved options could be sold to a third party if the BOC failed to obtain a waiver. In 1986, the Justice Department reviewed and approved an option to acquire an interest in a prohibited business that Ameritech was permitted to sell to a third party after seven years. Ameritech "would retain all proceeds from such a sale up to $3 million and would share any proceeds in excess of $3 million on a 50-50 basis." Millard Letter at 4. Likewise, in 1987, DOJ reviewed and approved a second Ameritech option that was transferable after three years and allowed Ameritech to keep all proceeds from the transfer, including any appreciation in value reflected in those proceeds. Ameritech was specifically allowed to keep such proceeds even in the event it failed to obtain the necessary MFJ waiver. Hester Letter at 3.

Several interested parties sought review of Ameritech's 1986 option because it was "transferable, and Ameritech would be free to sell its option to a third party without approval of the Court." Motion of IDCMA to Establish Briefing Schedule at 4 (filed Oct. 2, 1986) (footnotes omitted). The Justice Department opposed this challenge, *see* Opposition of the United States to Motion of IDCMA to Establish Briefing Schedule (filed Oct. 21, 1986), and Judge Greene permitted Ameritech to acquire the option.

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[26] In key respects, the MFJ prohibitions were stricter than section 271. The MFJ did not allow any *de minimis* ownership interest, in contrast to the 10% equity interest permitted under the statute. The 1996 Act also repealed the MFJ's prohibitions on interLATA wireless services,

Similarly, MCI challenged Ameritech's 1987 option on the ground that because "Ameritech proposes to acquire *transferable* options," it would have an "immediate equity interest," not merely a conditional interest. MCI's Protest to Justice's Report on Ameritech's Acquisition of a "Conditional" Interest in an Information Services Provider at 1 (filed July 30, 1987) (emphasis in original). Ameritech responded that it was "simply attempting to preserve an important business opportunity until it can get a waiver to engage in the new business. . . . If, after three years, it becomes apparent that Ameritech cannot obtain Court approval to exercise the option . . . , Ameritech should be permitted to liquidate its contingent position. Competition is not endangered because Ameritech may wish to *give up* its ability to enter the market." Ameritech's Response to MCI Protest at 1-2, 4 (filed Aug. 13, 1987) (emphasis in original). Judge Greene refused to grant MCI's protest, and Ameritech was allowed to acquire the option.

Finally, the Justice Department approved at least one transaction, analogous to the option proposed here, where a BOC restructured a pre-existing ownership interest in a prohibited business into a conditional interest as a means of ending the violation. In May 1987, SBC bought a 21.5% voting interest in a company that engaged in research and development of specialized telephone equipment. In December 1987, Judge Greene ruled that such activities were prohibited by the MFJ's manufacturing ban. SBC sought to restructure its current equity ownership into convertible warrants that could be exercised "at a nominal price." Affidavit of Robert A. Dickemper ¶ 5 (Apr. 4, 1988), attached to Report of the United States Concerning the Proposed Retention of a Conditional Interest by Southwestern Bell Corp. (filed Apr. 15, 1988). The Justice

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certain interLATA information services, royalty arrangements with manufacturers, and the selection of interLATA carriers for payphones.

Department approved SBC's holding the conversion rights represented by the warrants while it sought a waiver to own the prohibited business, and Judge Greene allowed the restructuring.

In sum, all relevant federal precedents, including prior Commission orders and rules, make it clear as a matter of law that under the proposed structure, Bell Atlantic/GTE will not own more than the permissible 10% of DataCo for purposes of section 271 unless and until Bell Atlantic/GTE exercises its option.

2. Bell Atlantic/GTE Will Not Control DataCo Pending InterLATA Relief.

Bell Atlantic/GTE will also not control DataCo before exercise of the option. Section 3(1) of the Communications Act does not set forth a standard for determining control, but under the Commission's precedents, control is generally a factual question that turns on multiple factors or the totality of circumstances. *See, e.g.*, *Stereo Broadcasters, Inc.*, 55 F.C.C.2d 819, 821 (1975), *modified*, 59 F.C.C.2d 1002 (1976) ("The ascertainment of control in most instances must of necessity transcend formulas, for it involves an issue of fact which must be resolved by the special circumstances presented."). Analyzing the standard factors typically considered by the Commission, it is plain that the public shareholders and not Bell Atlantic/GTE will control DataCo.

Most importantly, actual control will rest with the public shareholders who will hold 90% of the voting control of DataCo. Under our proposal, it is the public shareholders, not Bell Atlantic/GTE, who will control the election of all but one member of DataCo's board. Both the officers and directors of DataCo will owe fiduciary duties of loyalty and care to the public shareholders. And the public shareholders, not Bell Atlantic/GTE, will control the outcome of other decisions that are subject to general shareholder approval.

Nor will Bell Atlantic/GTE retain *de facto* control over DataCo. As the Commission has often reaffirmed, the "determinative question" in an analysis of *de facto* control is whether a party can "dominate the management of corporate affairs." *Trinity Broadcasting of Florida, Inc.*, 15 Comm. Reg. (P & F) 757 (1999); s*ee also Fox Television Stations, Inc.*, 10 FCC Rcd 8452, 8514 (1995) (quoting *Benjamin L. Dubb*, 16 F.C.C. 274, 289 (1951)). Here, it is absolutely clear that Bell Atlantic/GTE cannot dominate the management of DataCo's affairs while it owns only 10%. DataCo will be operated and managed independently from Bell Atlantic/GTE, and Bell Atlantic/GTE will have no control over the day-to-day management and operation of its business.

Other relevant factors in the *de facto* control analysis include whether the allegedly controlling party receives monies and profits derived from the operation of the facilities; whether that party is in charge of the payment of financing obligations, including operating expenses; and whether it has unfettered use of all facilities and equipment. *See, e.g.*, *Intermountain Microwave*, 24 Rad. Reg. (P & F) 983, 984 (1963). These additional factors further confirm that the investing public and not Bell Atlantic/GTE will control DataCo. First, Bell Atlantic/GTE will not derive more than a 10% share of the profits or other economic returns of DataCo's business before the option is exercised. Second, DataCo (not Bell Atlantic/GTE) will be responsible for its own financing. If DataCo wishes to obtain financing from Bell Atlantic/GTE, it will do so through arm's-length commercial loans. Finally, DataCo's management and board of directors will control the use of all facilities and equipment of DataCo.

This conclusion is not affected by the investor protections relating to fundamental business changes that will safeguard Bell Atlantic/GTE's rights as an option holder and minority investor. (These are listed in Schedule A.) Such provisions are ordinary and reasonable investor safeguards and are precisely the kinds of protections that any option holder or other prospective acquirer would have with an executory purchase agreement. Indeed, Bell Atlantic/GTE could reasonably obtain such purchaser safeguards if DataCo were *already* an independent public corporation and Bell Atlantic/GTE entered into an executory contract today to acquire 80% of DataCo after receiving interLATA relief.

Numerous Commission rulings clearly establish that precisely the sorts of investor safeguards involved here do not constitute control. As the Commission has repeatedly ruled, provisions such as these "fall within the scope of accepted purchaser safeguards that the Commission has previously found not to constitute a premature [license] transfer." *In re Applications of Puerto Rico Telephone Auth., Transferor, and GTE Holdings (Puerto Rico) LLC, Transferee,* 14 FCC Rcd 3122, ¶ 44 (1999). In its *Puerto Rico Telephone* order, the Commission specifically approved "limitations on the target compan[y's] entering into new lines of business, making substantial and material alterations to current contracts or agreements, disposing of material assets, and making substantial outlays of capital." *Id.* (citing specific license transfer precedents approving such protections).

The Commission has also consistently ruled that reasonable investor protections do not confer control for purposes of the Commission's attribution rules. For example, in *In re Applications of Roy H. Speer, Transferor, and Silver Management Co., Transferee*, 11 FCC Rcd 14147 (1996), the Commission ruled that a third party who held certain contractual veto rights over fundamental business changes did not have an attributable interest in a corporation. Similarly, in *Applications of Quincy D. Jones, Transferor, and Qwest Broadcasting, LLC, Transferee,* 11 FCC Rcd 2481 (1995), the Commission allowed a party who was prohibited from exercising control over a corporation nevertheless to hold supermajority voting rights concerning certain fundamental corporate decisions. The Commission explained that "[t]he right to participate in matters involving extraordinary corporate actions . . . does not ordinarily undermine the nonattributable character of otherwise noncognizable interests, so long as the voting rights or licensee obligations are narrowly circumscribed." *Id.* ¶ 29.

In cases such as these, the Commission has specifically approved veto or supermajority voting rights over business changes including: the sale or acquisition of significant assets outside the ordinary course; any merger or consolidation; the assumption of significant new debt; material changes to the corporate charter or by-laws; the payment of dividends in excess of profits; the issuance of new securities; the formation of new subsidiaries; entering into new lines of business; and significant transactions with other shareholders or interested parties.[27] These are the same

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[27] The specific veto rights approved in *Roy H. Speer* included vetos over: "any 'Fundamental Matter,' defined . . . to include the following actions: (1) any transaction not in the ordinary course of business . . . ; (2) the acquisition or disposition 'of any assets' or business with a value of 10 percent or more of the market value of [the total business]; (3) the incurrence of any indebtedness, which in a single transaction or in the aggregate has a value of ten percent or more of [the total business]; (4) any material amendments to the certificate of incorporation or bylaws . . .; (5) engaging in any line of business other than media, communications and entertainment products, services and programming; (6) the settlement of any litigation, arbitration or other proceeding which is other than in the ordinary course of business and which involves any material restriction on the conduct of business . . . ; and (7) any transaction between [the company and its majority owner], subject to exceptions relating to the size of the proposed transaction and those transactions which are otherwise on an arm's length basis." 11 FCC Rcd 14147, at ¶ 18.

In *Quincy D. Jones*, the Commission specifically permitted supermajority approval rights over the following corporate decisions: "(1) the sale or other disposition of any material portion of the LLC assets, other than in the ordinary course; (2) any merger or consolidation involving the LLC; (3) any voluntary liquidation, dissolution or termination of the LLC; (4) the declaration or payment of any distributions; (5) the issuance of any additional LLC shares or incurrence of debt in excess of $250,000 individually or $1 million in the aggregate; (6) any initial registered sorts of investor safeguards that will protect Bell Atlantic/GTE's interests in DataCo. *See* Schedule A.[28]

Nor will the marketing arrangements and various other commercial contracts between the two companies (detailed in Schedule B) give Bell Atlantic/GTE *de facto* control over DataCo's management. These contracts will be commercially reasonable in all respects and, with respect to administrative support services, will be limited in scope to specific administrative functions. Moreover, the fact that both companies will be public corporations with independent obligations to their shareholders will help ensure that all interactions between them will be commercially reasonable. The contracts involved here certainly will not enable Bell Atlantic/GTE to "dominate the management of corporate affairs" or decision-making of DataCo for purposes of the Commission's standard *de facto* control analysis. *See In re Lockheed Martin Corp.*, FCC 99-237, 1999 WL 717252, at ¶ 32 (1999).

Indeed, the administrative services contracts between Bell Atlantic/GTE and DataCo will be far *less* involved than typical transitional arrangements approved in other divestitures. Judge Greene, for example, in the Bell System breakup, approved the sharing of network facilities between AT&T and the Bell companies for up to eight years. *United States v. Western Elec. Co.*, 569 F. Supp. 1057, 1098 n.181 (D.D.C.), *aff'd sub nom. California v. United States*, 464 U.S.

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public offering of any LLC equity interests; (7) any change of Qwest's name or any amendment of the certificate of formation or the LLC agreement which adversely affect the rights of any LLC member; (8) the entry by the LLC into any agreement with a shareholder; (9) the creation of any subsidiary of the LLC; and (10) any acquisition or any agreement to acquire any entity." 11 FCC Rcd 2481, ¶ 9.

[28] Similar investor safeguards were repeatedly permitted to BOCs in connection with conditional interests in prohibited businesses under the MFJ.

1013 (1983). Although the MFJ strictly prohibited the Bell companies from offering interLATA services and required the Bell companies and AT&T to become independent as of the divestiture, the Bell companies were permitted for five and a half years after divestiture to "write inter-LATA orders for AT&T under a sharing contract" (provided they made such services available to other carriers as well); to "provide circuit provisioning functions for AT&T"; and to provide installation and maintenance services for AT&T's interLATA "special services." 569 F. Supp. at 1096 n.172. Other functions were allowed for even longer periods. *Id.* ("AT&T operators [were allowed to provide] inter-LATA Call Completion and Assistance services" for the Bell companies for up to 10-1/2 years after divestiture); 569 F. Supp. at 1098 n.181 (Bell companies were permitted to lease AT&T interLATA facilities for internal use for eight years). In each instance, Judge Greene found that the proposed sharing of facilities or personnel did not involve the Bell companies impermissibly in providing interLATA services and did not give AT&T "control over the [Bell companies' local exchange] functions." MFJ § I(A)(2).

In general, antitrust divestiture decrees whose purpose is to ensure independence of two competing businesses routinely permit and even *require* transitional services of various types. For example, in the pending antitrust decree involving Bell Atlantic's, GTE's, and Vodafone AirTouch's wireless businesses, the divesting companies are required to offer any purchaser of the divested wireless properties the ability "for a reasonable period at the election of the purchaser to use any of the divesting defendant's assets used in the operation of the wireless business being divested." Proposed Final Judgment § II.G, *United States v. Bell Atlantic Corp.*, Civil No. 1:99CV01119 (D.D.C. filed Dec. 6, 1999). The assets and services that may be provided include network assets and also "operational support systems, customer support and billing systems, interfaces with other service providers, . . . patents, . . . trademarks, . . . or other intellectual property." *Id.*

C. The DataCo Solution Is Fully Consistent With the Policies Behind Section 271.

The above discussion is sufficient to establish that under the applicable legal standards, DataCo will not be an "affiliate" of Bell Atlantic/GTE under sections 271 and 3(1) of the Act. Accordingly, the DataCo structure we have proposed will completely resolve the only legal issue raised under section 271. Beyond satisfying the strict letter of the law, this solution is also fully consistent with the underlying policies of section 271.

The DataCo solution will preserve and even enhance Bell Atlantic/GTE's incentives to comply fully and expeditiously with the 271 checklist requirements. Bell Atlantic/GTE will retain the same baseline incentive that all BOCs have to comply with 271 in order to gain in-region entry into the lucrative market for traditional voice long distance service. Furthermore, the five-year limitation on the exercise of Bell Atlantic/GTE's option, and the accompanying risk that Bell Atlantic/GTE will lose its ability to get GTE's valuable data business back, will create a powerful additional incentive for Bell Atlantic/GTE to complete the 271 process as quickly as possible in its remaining in-region states.

As Bell Atlantic/GTE moves forward with the 271 process, moreover, there is no significant risk that Bell Atlantic/GTE's BOCs will engage in discrimination in favor of DataCo. First, the nature of the Internet and related data businesses involved here ensures that, as a practical matter, there is little likelihood of discrimination. Presently, GTE Internetworking is not significantly dependent upon access to LEC local loops, switching, central office space or other core LEC facilities; its purchase of traditional local loops is limited to the provision of wholesale DSL service to ISPs, a business that currently accounts for less than 1% of GTE-I's revenues. The primary inputs GTE-I purchases from BOCs and other LECs are point-to-point circuits, principally DS-1s and DS-3s. In many locations, including the larger metropolitan areas where many of GTE-I's business customers are located, such circuits are available from multiple providers on a competitive basis.

Second, in those areas where a Bell Atlantic BOC is the only available provider of point-to-point circuits for DataCo, the risk of discrimination will be readily addressable. DataCo will purchase all such circuits on a tariffed basis, which will ensure that DataCo is not advantaged by discriminatory pricing. And any effort by Bell Atlantic/GTE to advantage DataCo in the timing or quality of provisioning of these circuits would be easily policeable by the Commission and competitors of DataCo.

Third, what is most important to consider is the impact on Bell Atlantic/GTE's *net* incentives, and the DataCo solution ensures that the incentive to comply with 271 will remain dominant. Bell Atlantic/GTE would have very little to gain and everything to lose if it acted anticompetitively to advantage DataCo. Discriminatory behavior by Bell Atlantic/GTE could confer only a small and highly contingent benefit. On the other hand, far outweighing that remote benefit is the fact that Bell Atlantic/GTE would run an enormous risk if it pursued a concerted effort to discriminate in favor of DataCo. Any hint of such discrimination would surely be trumpeted by opponents of 271 authority and could complicate or delay future 271 approvals, thus threatening Bell Atlantic/GTE's ability to exercise its option to retrieve ownership and control of DataCo. Evidence of such discrimination would likely also be used by such opponents as a basis to seek penalties from the Commission against Bell Atlantic/GTE, perhaps even including urging the Commission to impose the ultimate penalty -- rescission of 271 approvals previously granted. It would be irrational for Bell Atlantic/GTE to run any such risks.[29]

Beyond the issue of discrimination, the option structure here, which will separate GTE-I from Bell Atlantic/GTE until Bell Atlantic/GTE has received interLATA relief, is particularly well-suited to the fundamental design and objectives of section 271. The 271 interLATA restriction is temporary in nature; it is designed to fall away once Bell Atlantic/GTE satisfies the checklist requirements in the Bell Atlantic states. This restriction is very different from a prohibition, such as a horizontal cross-ownership prohibition, that is designed to be permanent or incapable of being fixed. Thus, in terms of the underlying statutory policies at issue, an option is even more appropriate here than in other regulatory or statutory contexts where similar arrangements have already been approved by the Commission.

Finally, the proposed arrangement will not automatically be applicable to other transactions or other contexts. This proposal is put forward in the context of a merger that

[29] Once again, MFJ precedents are relevant on this point, because the risk of discrimination was a factor considered by Judge Greene in approving similar conditional interests. *See* Conditional Interest Order at 5, 7. Under the MFJ, the Justice Department recognized that it "might be argued" that the "anticipation of a future interest" created by an option "may increase [the BOC's] incentive to discriminate against existing or potential competitors in providing access to the local exchange during the interim period." DOJ Tel-Optik Report at 12 n.10. Nevertheless, the Department concluded that "[s]uch behavior . . . is unlikely to occur in view of the fact that the Department and interested parties will be reviewing [the BOC's] waiver application during the very period when any such discriminatory activity would occur." *Id.* Judge Greene agreed, concluding that where the conditional interest could not be exercised without the granting of a waiver, "the legal obstacles to anticompetitive conduct are decisive." Conditional Interest Order at 7. Likewise, here, the availability of the 271 review process and the substantial risk that anticompetitive conduct by Bell Atlantic/GTE would

involves primarily non-interLATA businesses. GTE Internetworking currently accounts for less than 2% of Bell Atlantic/GTE's combined revenues. Furthermore, the arrangement we propose is narrowly tailored to address the unique factual circumstances and competitive interests raised by GTE-I's role as an Internet backbone provider. Preserving Bell Atlantic/GTE's ability ultimately to take back ownership and control of GTE-I will enable GTE-I to remain the only independent, non-IXC-owned top-tier Internet backbone, which, in turn, will help protect the fragile state of equilibrium among peering backbones that is critical to healthy competition throughout the Internet.

The eventual re-integration of a strong and independent GTE-I with the merged Bell Atlantic/GTE will enable competition to flourish for a full range of products and services in all major markets from coast to coast. In other words, not only will the specific solution we propose for GTE-I further the particular policies of section 271, but this merger *with this solution*, taken as a whole, will optimize competition across all markets and is therefore strongly in the public interest.

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jeopardize its ability to achieve or retain 271 approvals should thoroughly dispel any concerns about discrimination.

V. CONCLUSION

For the foregoing reasons, Bell Atlantic and GTE respectfully request that the Commission promptly grant the license transfer applications required to complete their merger.

Respectfully submitted,

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January 27, 2000